No. 77.

Brf. of Cleveland for D'ts

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Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 77.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

EMIL REISS, JAMES EDWARD REISS, FREDERICK REISS AND HENRY JACQUES REISS,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

FREDERIC E. MYGATT,
GEORGE RICHARDS,
TREADWELL CLEVELAND,
Counsel for Defendants in Error.

Supreme Court of the United States.

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THE TEXAS AND PACIFIC RAILWAY COMPANY, *Plaintiff in Error,* *against* EMIL REISS, JAMES EDWARD REISS, FREDERICK REISS and HENRY JACQUES REISS, *Defendants in Error.*	No. 77.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

Statement.

This action was brought by the defendants in error, the plaintiffs in the Circuit Court, and hereinafter called the plaintiffs, against the plaintiff in error, the Railway Company, hereinafter called the defendant, to recover the value of two hundred bales of cotton, delivered to the defendant as a common carrier, and destroyed, while in its possession, by the burning of its wharf at West Wego, in the State of Louisiana, on November 12, 1894.

The defendant, in its answer, admitted the receipt of the cotton in suit, and its destruction by fire at West Wego, at the time alleged, but denied that

the cotton was then in its possession as a common carrier.

The case has been tried twice. On the first trial a verdict was directed in favor of the defendant (Lacombe, *J.*).

On appeal by the plaintiffs to the Circuit Court of Appeals, the judgment rendered on such verdict was reversed (98 Fed. Rep., 533).

Upon the second trial the Circuit Judge (Lacombe, *J.*) directed a verdict for the plaintiffs in accordance with the said decision of the Circuit Court of Appeals. The judgment rendered on that verdict was affirmed, on its former opinion, when the case again came up before the Circuit Court of Appeals (99 Fed. Rep., 1006), and from the judgment entered upon that decision this writ of error has been taken by the defendant.

The transcript of record herein, being of the proceedings on the second trial only, does not contain the opinion of the Circuit Court of Appeals rendered on the first appeal, but its material portions are quoted herein.

On both trials of this action, and also before the Circuit Court of Appeals, it was contended by the plaintiffs that taking this cotton to West Wego constituted a deviation which operated to withdraw from the defendant the benefit of any exemptions from its common law liability contained in its bill of lading, and a large part of the evidence in the transcript of record herein was presented upon that point.

This question of deviation, affecting all other cases now pending in the Second Circuit, arising out of this fire, is not argued in this brief, as the evidence on this point is much fuller in the case of Marande and others, plaintiffs in error, against the Texas and Pacific Railway Company, defendant in error, No. 86 upon the present calendar.

The first of this series of cases to reach this Court was that of Texas & Pacific Railway Company *vs.*

Clayton, 173 U. S., 348. In that case, notwithstanding the provision in the bill of lading that in case of loss, that carrier alone should be liable in whose custody the goods were at the time of the loss, and the fact that the Railway Company had the cotton in its exclusive possession and care, on its wharf, it was contended that the cotton had been delivered by the Railway Company to the Steamship Company. This contention was, however, unanimously rejected by this Court and the defendant held liable.

No question of delivery, either actual or constructive, is raised by this appeal, the only contention of the defendant being that under the bill of lading in suit, the cotton "was awaiting further conveyance"; that the liability of the defendant was thus that of warehouseman only, and, no negligence having been proved, no recovery can be had.

The facts concerning the care and custody of the cotton at Westwego and the methods pursued between the Railway Company and the Steamship Company in relation to the delivery there by one carrier to the other are stated quite fully in the *Clayton* case (*supra*).

Two matters contained in that statement should, however, be now noticed.

Speaking of a transfer sheet (in substance, the notice of arrival), this Court there said:

> * * * "which being at once transmitted to the Steamship Company, or its agents, was a notification understood by the Steamship Company's agents that cotton for their line was on the wharf at Westwego ready for them to come and take away."

The use of the words, "at once," is inaccurate. In this case, the cotton in suit arrived at Westwego on November 6th and was unloaded on November 7th, but no transfer sheet or other notice of arrival was sent to the Steamship Company before the fire (p. 19).

Again the Court, in the *Clayton* case, says:

> "The stevedore and all men employed in loading the vessel were wholly in the employ of the Steamship Company."

This is not in accordance with the testimony in this case of Miller, the general freight agent, who testified as follows:

> "After our receipt from the Steamship Company of these transfer slips with marks of lots of cotton upon them, if it should be necessary to get out the cotton mentioned in them, that would be attended to by some of the employees at Westwego, the railway employees at Westwego, as to locating the cotton and getting it out. It was not necessary to get it out at all times. It was on the wharf. It was all over the wharf. It was usually stored, and inside of the railway track toward the land. I don't know that I issued any specific orders to any one in respect to getting out that cotton. It was understood that we would get out cotton when necessary to do it. By 'getting out cotton,' I mean trucking it out from where it was originally stored on the wharf, out, say in front or, when enough in front, to enable the steamship people to get it out without having to go around other piles of the cotton. When that was done at all it was usually done after the receipt of these transfer slips from the Steamship Company.
>
> Q. Was it usually done?
>
> A. That would depend on the location of the cotton on the wharf. In some instances it was done and in some instances it was not done. I do not mean, necessarily, that before the receipt of the transfer slips from the Steamship Company, the cotton that was destined for a steamer was put between the sheds and the river; I simply mean that if cotton which Elder, Dempster & Company, for instance, sent a steamer there to get, if it was where they could get at that cotton, if there was no obstruction of any consequence between where this cotton was stored, that they

went there to get, and the ship's side, that, in that case, we had nothing to do with getting it out; they took it from where it was located" (p. 13).

The bill of lading in the *Clayton* case contained this clause:

> "In case of any loss, detriment or damage done to or sustained by said cotton before its arrival and delivery at its final destination, whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual custody the cotton shall be at the time of such damage, detriment or loss."

A similar provision, though not so elaborately expressed, is contained in paragraph three of the bill of lading in this case. All the provisions in this Bill of Lading which are material to this controversy are as follows:

"Conditions.

WITH RESPECT TO THE SERVICE UNTIL DELIVERY AT THE PORT OF NEW ORLEANS, LA., IT IS AGREED THAT

> 3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. * * *
>
> 11. No carrier shall be liable for delay, nor in any other respect than as warehouseman, while the said property awaits further conveyance, and in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer of the ocean line above stated, leaving after the arrival of such property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer.

> 12. This contract is executed and accomplished, and all liability hereunder terminates on the delivery of the said property to the steamship, her master, agent or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien due and payable by the steamship company" (pp. 80, 81).

In no part of these "conditions with respect to the service until the delivery at the port of New Orleans, La.," is there any mention of the word "FIRE."

In the conditions "with respect to the service *after* delivery at the port of New Orleans, La.," this most frequent cause of loss is very emphatically guarded against.

The Bill of Lading provides:

> It is agreed that * * * That the carrier shall not be liable for loss or damage occasioned by fire from any cause or whereso-ever occurring (p. 82).
>
> IX.—Also, that merchandise on wharf awaiting shipment or delivery be at shipper's risk of loss or damage by fire or flood, not happening through the fault or negligence of the owner, master, agent or manager of the vessel * * * (p. 83).

The contract between these carriers as to delivery by one to the other provides for

> "Delivery unrestricted" (p. 95).

That is, the Railway Company had the right to deliver, as the Steamship Company had the right to decline or to accept delivery, at any time during the cotton season.

This contract was wholly unknown to the shipper. The only reference to it in the bill of lading is "T. & P., No. 69" (p. 79).

It would appear that the cotton in suit was shipped under some special arrangement as to quick

transportation. There is no mention of this on the bill of lading, but on the face and endorsement of the way bill from Temple, Texas, where the cotton was shipped, are the words:

"Time freight; hurry through" (pp. 87, 88).

A futile attempt was made in the Court below to show that the ordinary, usual course of business between these two carriers was not as stated by this Court in the *Clayton* case, and that cotton was regularly shipped on steamships without any prior notice of arrival of such cotton at Westwego having been sent by the Railway Company to the Steamship Company.

The testimony to support this contention, however, simply relates to occasional occurrences, and to the time when a vessel had actually arrived at New Orleans and was proceeding to Westwego or was at Westwego loading. At such times it would appear that occasional telephonic communications were had between Wilkinson, who was the dock superintendent, and the ship owners relating to the ship taking more cotton than was mentioned on the transfer sheets which had then been sent by the Railway Company to the Steamship Company and returned by the Steamship Company. But this method especially related to shipments of the whole of one lot of cotton bearing one mark, or to one or two instances, where it was found that the vessel could take more cotton than was expected. The whole testimony shows, beyond contradiction, that the ordinary, usual method was, as stated by the Court in the *Clayton* case; and in this case Miller, who was the general freight agent and had superintending charge of the whole matter, says (p. 11): "That was our regular recognized course," namely, giving the Steamship Company notice of arrival of certain lots of cotton, the Steamship Company then returning these transfer sheets, showing what cotton they would be ready to take delivery of.

The Steamship Company did not otherwise know of the existence or the arrival of the cotton; it was only after a vessel had arrived at the dock at West Wego and the Steamship Company was informed that certain cotton was there, that any other method than that of the sending of the transfer sheets and their return with a direction by the Steamship Company to deliver designated cotton to a ship, was ever used.

First Point.

The duty of the defendant as to the cotton in suit did not end with the mere unloading thereof upon its wharf at West Wego, and NO NOTICE OF THE ARRIVAL OF THIS COTTON HAVING BEEN GIVEN TO THE NEXT CARRIER, *it was not "awaiting further conveyance" in the sense contemplated by the bill of lading. The liability of the defendant had not changed from that of carrier to that of warehouseman.*

The opinion of the Circuit Court of Appeals, after stating the facts, is as follows:

> "No transfer sheets respecting the cotton in suit, and no notice of its arrival at West Wego, were ever sent to the steamship company. A practice has grown up since the fire for a vessel to receive cotton which had arrived in accordance with the bill of lading for which the ship had room, although the steamship company had not received transfer sheets; that is, to receive any cotton which entirely corresponded with the bills of lading for which it had room and receipt for it. This cannot be stated as at any time a general usage. The case turned in the Circuit Court upon the construction of clause 11 of the bill of lading, and the Circuit Judge was of opinion that the term 'awaiting further conveyance' meant not only when the next carrier was about to take possession, but

when the property had been unloaded from the cars and placed in proper position for future transportation, although notice of arrival or tender of delivery has not been made. He therefore directed a verdict for the defendant and to review the judgment which was entered upon the verdict this writ of error was taken.

The subject of the obligation of a carrier, at common law, towards property while it is in transportation to its ultimate destination and is to be taken by a connecting carrier was considered in Michigan Cent. R. Co. *v.* Mineral Springs Mfg. Co., 16 Wall, 'and other cases.' In the first named of which it is said:

> 'In such cases it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line and to deliver to the next carrier beyond; and that public policy requires that the rule should be enforced and will not allow the carrier to escape responsibility at the end of his route without delivery or an attempt to deliver to the conecting carrier.'

Furthermore, in the absence of a special contract, it was said in the Clayton case in this court:

> 'Although the second carrier after notice and a request to do so has neglected for an unreasonable time to receive the goods, the first carrier must, to exonerate himself as an insurer, in some way clearly indicate his renunciation of the relation of carrier.'

The mere unreasonable delay of the connecting carrier is not sufficient to convert the first carrier into a warehouseman. This renunciation is ordinarily shown by notice to the connecting carrier that the property will be kept or stored at its risk until compliance with the request to remove (Texas & P. Ry. Co. cases, *supra*). This rule of law being admitted, it is said by the defendant that a special contract was clearly stated in its bill of lading, by which it became a warehouse man from the time that the cotton was unladen and piled upon the wharf to await cartage to the steamship. It is not claimed that the facts bring the carrier's liability within

clause 3 of the bill of lading, which says that the liability shall end after the property 'is ready for delivery' to the next carrier, for it is conceded that the goods are not awaiting delivery before any notification of their arrival to the connecting carrier (McKinney *v.* Jewett, 90 N. Y., 267). It is, however, insisted that the fair construction of clause 11 is that, when the act of transportation of the cotton to the wharf at West Wego has been accomplished, and it has been stacked on the wharf, and 'is awaiting further action in the way of notification and advice to the succeeding carrier,' it awaits further conveyance. By this construction the parties substituted an immediate cessation of the liability of a carrier, and the assumption of the liability of warehouseman for the liability imposed by the common law, and doubtless they were at liberty to make a contract of limitation, which will be enforced if the language of the bill of lading clearly indicates that such was their intention. In order to justify the defendant's construction, the claimed extent of the departure from the implied contract of the common law must clearly appear in the language which is used in the special contract. The clause 'no carrier shall be liable for delay,' when applied to the facts in this case, meant that the defendant should not be liable for the delay of the steamship company, but delay would not occur until it knew or had heard of the time of the arrival of the cotton. The same idea of notification to the connecting line must also run through the entire paragraph, and while the term 'awaiting further conveyance' literally means 'awaiting the time when the next carrier shall take the property in hand,' it seems improbable that it was the intent of the language that the liability of the carrier should terminate upon the deposit of the property upon the wharf. The language is too indefinite to support the conclusion that notice to the connecting carrier was not a prerequisite to the change of liability to that of a warehouseman. It may well be that such change would take place when the property was awaiting conveyance by the connecting line which

> had been notified to receive and convey, but until then *it is not awaiting conveyance; it is awaiting the action of the first carrier.* The term must mean awaiting conveyance by the person upon whom the duty of conveyance devolved, and no such duty devolved until notice of the arrival of the property had been given" (98 F. R., 533).

The plaintiffs might well leave their case in the hands of this Court, on this clear and satisfactory opinion of the Court below.

The conclusion that until notice of the arrival of this cotton had been given by this defendant to the next carrier

> "*it is not awaiting conveyance; it is awaiting the action of the first carrier,*"

cannot, we submit, be successfully controverted.

We may, however, make the following additional suggestions:

A.

The bill of lading upon its face shows that it is the result of great deliberation and care.

It is headed "Export bill of lading approved by the permanent committee on uniform bill of lading to take effect July 1, 1893." It is long and intricate, and full of exceptions, conditions and attempts to evade or limit liability.

Although, as this Court has very recently said, restrictions upon the liability of a common carrier contained in a bill of lading

> "*ought not to be wholly frittered away by an adherence to the letter of the contract in obviovs disregard of its intent and spirit.*"

There is, nevertheless,

> "*no doubt of the general proposition that restrictions upon the liability of a common carrier inserted by him in the bill of lading for his own benefit and in language chosen by himself, must be narrowly construed.*"
>
> *Queen of the Pacific*, 180 U. S., 52, 57.

We submit that to such a bill of lading as this, the result of the deliberations of a committee of carriers formed for the purpose of its preparation, this rule of law is especially applicable.

We are not then dealing with the question of a broad, loose, liberal interpretation of this contract, but with the question of what these terms strictly construed mean.

B.

"Await" is the state of waiting. The action of what carrier was this cotton awaiting? Primarily the action of the first carrier until all the duty of the first carrier was performed. And what clause is there in this bill of lading that can relieve the carrier of the well settled duty of giving notice to the connecting carrier? And how could this property be said to be awaiting conveyance by the succeeding carrier until such succeeding carrier has notice of its arrival at the point where such succeeding carrier is expected to commence such further conveyance?

We are not called upon in this case to determine what would be the proper interpretation of the words "while the property awaits further conveyance" under other facts, nor are we called upon to indulge our imagination as to what certain other clauses in this bill of lading might mean under certain other hypothetical states of fact. There is this single narrow question to be determined, and we have never been able to see how the railway carrier, under any reasonably strict interpretation of the bill of lading, can hope to escape from the conclusion that this property was *not* awaiting further conveyance, it not having taken the first step to set the further conveyer in motion.

The principle that the liability of this defendant was that of an insurer until it had carried this cotton to the port of New Orleans and there delivered it to the next carrier, unless such liability was altered by

the terms of the bill of lading, needs no authority to support it.

It is likewise well settled that, in the absence of an express stipulation, the duty of an intermediate carrier is not ended by the mere unloading of goods at the terminus of its road, unaccompanied by any delivery or tender of delivery to the next carrier.

Says Judge Cooley, in *Condon* v. *Marquette H. & O. R. Co.*, 55 *Mich.*, 218; 18 *Am. & Eng. R. R. Cases*, 574:

> "The duty of one [connecting carrier] is not discharged until it has been imposed upon the succeeding carrier, and this is not done until there is delivery of the goods, or at least such a notification to the succeeding carrier as, according to the course of the business, is equivalent to a tender of delivery. There is nothing in this which is burdensome to the carrier, for this is the customary method in which the business is done, and the rule only requires that the customary method shall be pursued without unreasonable delay or negligence. * * * We are not ready to assent to the doctrine that a railroad company, as to goods transported by it, ceases to be carrier the moment the goods are received at its warehouse. We do not think this is the law' or that it ought to be."

By the New York Court of Appeals it is said:

> The carrier's obligation is, "to carry the goods safely to the end of their road, and deliver them to the next carrier on the route beyond. A carrier, in such case, does not release himself from liability by simply unloading the goods at the end of his route, and placing them in his own storehouse, without delivery or notice to, or any attempt to deliver to, the next carrier."
>
> McDonald *vs.* Western R. Co., 34 N. Y., 497, at p. 500.

Applying these principles to the case at bar, it is apparent that unless defendant's common law obligation to carry and deliver, was altered by the clear

purport of the terms of the bill of lading, strictly construed, it was liable for the loss, no delivery having been made.

What, then, is the effect of clause 11 in this regard? Does it operate as the Railway Company contends, to change the liability of this defendant *the moment the goods are unloaded upon its wharf?*

This paragraph consists of one sentence only, and its natural, obvious, reasonable construction is, that it applies to a case when a duty resting upon the steamship company has not been performed. The single clause "no carrier shall be liable * * * in any other respect than as warehousemen while the said property awaits further conveyance" is not to be wrenched from its surroundings, but is to be construed as it is written, and the whole paragraph, being one sentence, must be considered to arrive at a true meaning of any of its parts. All of its parts are evidently intended to apply to a class of facts or circumstances constituting a delay of the Steamship Company, where the Railway Company has done its whole duty, and where, having done that duty, there is some delay on the part of the Steamship Company in the performance of some obligation resting upon it not to delay, but to take up and perform its part of the contract.

The whole scope of the eleventh paragraph contemplates not only the unloading of the cotton, *but the giving of a notice of arrival* to the next carrier. The cotton could not go on the next steamer, as provided in this clause, unless it was delivered to such steamer or a notice of its arrival was given to the Steamship Company, so that such connecting carrier might send to the Railway Company and take it.

Concerning the cotton in suit, however,

NO NOTIFICATION WHATEVER HAD BEEN GIVEN BY THE DEFENDANT TO THE NEXT CARRIER (fol. 31).

During the whole of the time that the cotton remained on the dock in the sole care and custody of the defendant, from November 7th until November

12th, when it was destroyed by fire, *the defendant had made no attempt to deliver it to the next carrier, and had not even notified it, according to the "regular recognized course" of business, that the cotton was there.*

In the case of McKinney *v.* Jewett, 90 N. Y., 267, the Court was construing a clause in a shipping receipt which, as stated by the Court, "provided in substance that the carrier should not be liable as such while the goods were 'at any of their stations awaiting delivery' to the consignee; and that during such period the carrier should be liable only as warehouseman," and after stating the facts the Court says:

> "The goods are 'awaiting delivery' only after the duty of the carrier is done and he is entitled to remain passive 'awaiting' the action of the consignee * * * but no rule authorizes us to pervert the fair meaning of words and to substitute for something that is said, what is not said at all. We do not think that the language of this shipping bill is doubtful or ambiguous; it means as we have stated that after the goods have arrived and the carrier has given notice to the consignee at the time which furnishes reasonable opportunity for him to get them, then the carrier's responsibility as such ends, and then and not until then are the goods 'awaiting delivery.'"

As was well said by the Circuit Court of Appeals:

> "In order to justify the defendant's construction, the claimed extent of the departure from the implied contract of the common law must clearly appear in the language which is used in the special contract."

And in the special contract under consideration

> "The language is too indefinite to support the conclusion that notice to the connecting carrier was not a prerequisite to the change of liability to that of warehouseman."

C.

The construction contended for by the defendant is most fanciful and unreasonable. If the cotton had been unloaded an hour before the fire, the defendant claims it would have been "awaiting further conveyance," and it is driven to admit that such construction would also be as applicable to a state of facts between two railway carriers at the terminus of the line of one and the commencement of the line of the other, and is forced to contend that had the cotton arrived in cars at the end of the line of one railway carrier ready to be further conveyed by the locomotive of the succeeding carrier, the cotton in the cars on the track of the first railway would have been awaiting further conveyance, and the liability of such carrier would have been that of warehouseman. Is such an interpretation reasonable? Is it otherwise than forced, strained, devised to meet the exigency of the situation?

D.

But we must not overlook any part of the situation. It needs no authority to support the position that these shippers had the right to expect that the cotton would be subject to only the reasonable, ordinary delays and exigencies of the usual course of transportation.

In this case there was a radical departure from this course, and this may account for the neglect of the defendant to give the Steamship Company any notice of the arrival of the cotton.

This cotton, by the secret contract between these two carriers, was to be delivered and taken not in the usual course of trade, but whenever they pleased. As far as the Steamship Company was concerned, it was under no obligation whatever to carry this cotton in the usual course of transportation or to go for it to West Wego within any reasonable time, even if the Railway Company had given notice of arrival. Had the Railway Company even actually tendered delivery the Steamship Company

was under no obligation to accept delivery. This situation arose by reason of this secret contract. All restrictions of the law as to notice and obligations to take, were, *as between these two carriers*, swept away by the language of this extraordinary secret contract, "delivery unrestricted."

Under these circumstances it would be most unreasonable to hold that the Railway Company immediately upon the unloading of the cotton on its dock and while it was awaiting its convenience as to giving notice of arrival, was turned into a warehouseman.

E.

Still another departure from the usual course of trade exists in this cause.

In the brief in the Marande case (No. 86), we have stated our contention as to the carriage of this cotton to Westwego being such a deviation as avoided all the limitations of liability contained in the bill of lading; but whether such performance by the Railway Company is such a deviation or not, it was, we submit, as far as this shipment of 200 bales of cotton was concerned, a deviation which avoided the limitation of "awaiting further conveyance," for it is undisputed that no ship of the Elder Dempster line would go to "Westwego for less than 2,000 bales."

As appears from the map, Plaintiffs' Exhibit G (between pp. 84 and 85), West Wego was in the Parish of Jefferson, across the river from the extreme upper end of the City of New Orleans. The dock and elevator of this defendant, which were all there was at West Wego in 1894 (the year of the fire) were not completed until the spring of 1893 (Miller, p. 9). They were built by the defendant, and were at all times under its absolute and complete control (Le Blanc, p. 27; Wilkinson, p. 43).

Prior to the building of this dock at West Wego in 1893 there was nothing there except the levee, and all of the cotton carried by this defendant was delivered by it to steamships in New Orleans on the

New Orleans side of the river (Miller, p. 9; Le Blanc, p. 27, and Warriner, p. 31).

But after the creation of the dock at West Wego various lines of steamships went there *under special arrangement* to receive cotton.

The testimony as to the arrangements under which the various steamship lines would send their vessels to West Wego differs only in regard to the number of bales which they would go there for.

Mr. Le Blanc, the agent of the Harrison Line, says:

> "We wouldn't go there for less than 1,000 or 1,500 bales" (p. 27).

Mr. Hammond, of the Hammond Line, says:

> "It was always understood we should not go there for less than 1,000 bales on account of extra cost of towage involved and the loss of time" (p. 57).

Mr. Warriner, the agent of the Elder Dempster Line, the line which was to carry the cotton in suit, says:

> "We would not send a ship [there] for less than 2,000 bales or so, so as to keep us working at least a whole day" (p. 61).

Mr. Sanders, the agent of the West India and Pacific Steamship Company, says:

> "We had a general understanding that we would not send the vessels to West Wego unless there was a certain quantity of cotton ready for delivery to us at one time; that quantity I believe was fixed at 1,500 to 3,000 bales, and we would not send our vessels for a smaller quantity than say, 2,000 bales" (p. 66).

Mr. Ross, a member of the firm of Ross, Howe & Morrow, steamship agents at New Orleans, says:

> "The minimum amount for which I would go to West Wego according to my recollection

was probably in the neighborhood of two thousand bales, something of that sort" (p. 71).

Mr. Fornaris, the agent of the French line, says:

He would not send a vessel over there for less than one thousand bales (p. 75).

This testimony helps to explain why this secret contract concerning delivery was entered into; a contract which gave the right to the Steamship Company to take delivery when it chose.

The Steamship Company, as it would not send a ship to Westwego for less than 2,000 bales of cotton, could not, of course, be bound by the usual obligations of the law as to taking delivery of small lots of cotton from the Railway Company at Westwego in any reasonable time after its arrival there, and it was essential for the Steamship Company, as the Railway Company was to set out the cotton at Westwego instead of taking it into the City of New Orleans, where, always prior to 1893 it had delivered cotton to steamship companies, to have absolute freedom as to taking delivery at Westwego.

At Westwego there could thus have been no "awaiting further conveyance" by the Steamship Company, in the ordinary, reasonable sense of the term as contained in this bill of lading, and the secret contract, and the practice under it, prohibits, as we submit, this defendant from claiming the benefit of the restricted liability under the 11th clause; its whole spirit, as well as the letter of it, was absolutely violated.

F.

The clause as to delivery contained in paragraph 3, is clearly void. It is:

> "*No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after such property is ready for delivery to the next carrier or to consignee.*"

By this clause the carrier is exempted from every loss when the property is said to be ready for delivery, including losses arising from its own negligence. It needs surely no authority to establish the invalidity of this proposition, and we are at a loss to see how even this defendant can pretend, since all liability for any loss or damage is restricted to that carrier upon whose road, or on whose portion of the through route such loss or damage occurs, that after the Railway Company had property ready for delivery, the shipper was absolutely precluded from recovering for loss or damage from either the Railway Company or the Steamship Company.

"Ready for delivery" must also mean ready for delivery in the ordinary course of transportation. But there is no such course here. The secret contract between those carriers as to delivery, precludes the possibility of the usual course of delivery being followed.

G.

Clause 12th has absolutely no application to the questions here discussed.

The contention that the dock of the Railway Company at Westwego, which was a dock owned, occupied and under the exclusive care and control of the Railway Company, upon which no one could go without the consent of the Railway Company, and from which no one could remove any property without the receipt of the Railway Company, was the Steamship Pier in the sense of the 12th clause of the bill of lading, is a contention so obviously at war with all the facts of the case, that it needs no discussion at this bar.

H.

Nor is it necessary in order to have a correct view of the non-applicability of the words "awaiting further conveyance" as contained in the 11th clause of this bill of lading to the facts in the case at bar, to be able to infallibly imagine a situation to which these words might be applied as distinguished

from a state of facts to which the provisions of the 3d clause, if it were valid, could be applicable, or to a state of facts to which the provisions of the 12th clause would be applicable.

This bill of lading is a general form of an export bill of lading covering shipments of any class of goods from Galveston to Portland, and applies to the vast variety of transactions of this busy age. It is doubtless true that the committee on the preparation of this bill of lading strove to catch the shipper, turn whichever way he would. But we submit that as applied to the facts of this case, such committee has been wholly unsuccessful.

The defendant has singled out a single phrase in a sentence of the opinion in the Court below, viz.:

> "It may be that such change [from carrier
> " to warehouseman] would take place when
> " the property was awaiting conveyance by
> " the connecting line which had been notified
> " to receive and convey it," &c.,

and attempts to build up an argument on this. But such expression was wholly *obiter*. No such state of facts exists in this case, and this Court was for the moment evidently forgetful of the fact that no usual course of business was possible between these carriers owing to the secret arrangement made by them behind the back of the shippers that delivery could be made and accepted at any time and that the Steamship need not go to Westwego for less than 2,000 bales of cotton.

Second Point.

While the cotton was in the possession of the Railway Company fire was not an excepted peril.

The degree of care and attention given to this bill of lading has been already commented upon, and it is, we submit, a controlling fact that in the conditions which this committee of carriers devised with

respect to the service *until* delivery at the Port of New Orleans fire is not mentioned, while on the other hand, in the conditions with respect to the service *after* delivery at the Port of New Orleans, this risk of fire, certainly the most frequent source of loss, the greatest peril to which cotton is exposed, is very carefully guarded against.

The persons who drew this bill of lading certainly knew how to express themselves when they wished to guard against any particular peril, for as to fire *after* delivery at the Port of New Orleans the bill of lading says:

> "That the carrier shall not be liable for loss or damage occasioned by fire from any cause or wheresoever occurring" (p. 82).
>
> * * * * *
>
> "Also, that merchandise on wharf awaiting shipment or delivery be at shipper's risk of loss or damage by flood not happening through fault or negligence of the owner, master, agent or manager of the vessel" (p. 83).

Can there be any stronger proof of the fact that fire was not intended to be included among the risks excepted while the cotton was in the hands of the land carrier than that—

1. It is *not* mentioned in the excepted risks of the land carrier, and

2. It *is* mentioned and most carefully guarded against in the excepted risks of the steamship carrier.

The language of this Court in *Liverpool Steam Co.* vs. *Phenix Ins. Co.*, 129 *U. S.*, 397, *at p.* 463, is peculiarly applicable to this point. In that case the Court, speaking of the right of a carrier to the benefit of an insurance clause contained in the bill of lading, says:

> "The through bills of lading of the cotton are signed by an agent of the railroad companies and the steamship companies, 'severally, but not jointly,' and contain, in separate columns, two entirely distinct sets of 'terms

> and conditions'—the first relating exclusively to the land carriage by the railroads and their connections, and the second to the ocean transportation by the steamship. The clause relied on * * * [stating it] is inserted in the midst of the terms and conditions defining the liability of the railroad companies, and is omitted in those defining the liability of the steamship company, *plainly signifying an intention that this clause should not apply to the latter.*"

If it had been intended that cotton on the wharf of the railway company and before it got into the hands of the steamship company and awaiting shipment or delivery, should be at shipper's risk of loss or damage by fire, the bill of lading would undoubtedly have so recited.

Plain language to express plain ideas is not lacking in this bill of lading.

This bill of lading, drawn with open eyes, was evidently *a bid by one of several competing railroads for cotton trade*, and *exemption from loss by fire was intentionally refused* to the land carrier. Various perils for loss from which the land carrier should not be held liable are specified, *but there is absolutely no reference to fire, a peril* which is constantly before the minds of carriers, and particularly of those roads which handle quantities of cotton, *and which was before the minds of the drawers of this bill of lading*, as shown by its insertion in other parts thereof.

The whole construction of this bill of lading demonstrates that it was not intended that the land carrier should be exempted from loss by fire. What it contains and what it fails to contain are both conclusive on this point.

It is not reasonable to suppose that a carrier, in drawing a general form of a bill of lading to be used in connection with the general shipment of goods from any number of different points, *will pass over such an important and much feared peril as fire and omit to enumerate it among its specific exemptions*,

unless it be the intention not to include it in such exemptions. It is not reasonable to suppose that a carrier will depend for relief from loss by fire upon a general exemption, the effect of which, to say the least, might be questioned.

This view is emphasized by the fact that fire was a peril which was in the minds of the makers of this bill. *They expressly exempted the ocean carrier from loss by fire, and expressly omitted to exempt the land carrier therefrom.*

That was the effect of the bill of lading, and that was the intent.

An exemption, however, which will operate to relieve this defendant from liability for loss by fire must be clearly expressed in the bill of lading, so clearly in fact that a shipper on reading the bill would understand that fire was one of the excepted perils.

> "In order * * * to effect * * * a limitation [of liability], it is well settled, as the rule itself clearly indicates, that *the contract by which the exemption is secured must be clear, special and express. The immunity cannot arise from inference or from the use of general or ambiguous terms.*"
>
> *Hutch. on Car.*, § 237 *A*, *citing cases.*

The effect, however, of the insertion in contracts of this character of a group of particular exemptions, as contained in clause 1 of this bill of lading, is not confined to the particular clause in which they are inserted, but operates throughout the whole contract to limit and restrict the meaning of general words thereafter inserted.

> "General words of exemption when used after a specification of particular exemptions and risks will be presumed to include only those of a similar character unless a different intent appear."
>
> *Lawson on Carriers*, § 150.

"Particular exemptions are not enlarged by general language, and when the particular dangers or risks against which the carrier has specifically guarded in his receipt are followed by more general and comprehensive words of exemption the latter are to be construed to embrace *only* occurrences *ejusdem generis* with those previously enumerated, unless there be a clear intent to the contrary."

Hutchison on Carriers, § 276.

See also

Menzell v. *Railway Company*, 1 *Dillon*, 531.

Zimmer vs. *New York Central & H. R. R.*, 42 *N. Y. State Rep.*, 63.

The G. R. Booth, 62 *U. S. App.*, 407.

Having enumerated in clause 1 the specific exemptions of which the land carrier is to be allowed the benefit, this defendant cannot claim the benefit of any *other* exemptions unless they be added *by express language*. *Expressio unius, exclusio alterius.*

Therefore, unless the land carrier be specially exempted from loss by fire by a clear, special and express provision, it cannot claim exemption therefrom.

Menzell vs. *Railway Company*, 1 *Dillon*, 531, was an action brought to recover from the defendant railway company the value of certain goods alleged to have been delivered to it as a common carrier, for transportation from Marshalltown, in Iowa, to Oshkosh, in Wisconsin. The answer admitted the delivery of the goods to the defendant and set up a special contract, signed by the plaintiff, by which "in consideration of the company transporting the property to Chicago station," the plaintiff "does hereby release the said company, and each and every other company, over whose lines said goods may pass to destination, from any and all damages that may occur to said goods, arising from leakage or decay, chafing or breakage, or from any other cause not the result of collision of

trains, or of cars being thrown from the track while in transit." The answer also alleged that in course of transportation at Chicago it was necessary to put the goods in defendant's warehouse or freight depot at that place, and that while there the building accidentally took fire and the goods were destroyed.

And the Court after holding that the shipper and the company might, by contract, limit the common law liability of the latter, says:

> "Therefore, if the plaintiff, for a consideration, had knowingly entered into a contract with the company, specifically releasing it from all liability for loss of the goods by accidental fire, without fault on its part, while in transit, such a contract, it is conceded, would be binding upon the plaintiff. But did the plaintiff in this case make any such contract? This involves a construction of the special contract set up by the company. The language is, '*I hereby release said company from any and all damage that may occur* to said goods, arising from leakage or decay, chafing or breakage, *or* (and this is the language relied on) *from any other cause not the result of collision of trains, or of cars being thrown from the track while in transit.*'
>
> *Construing this* general and indefinite *language conformably to the rules adopted by courts in the interpretation of contracts of this kind, it is my opinion that it does not* plainly or satisfactorily appear therefrom that the parties intended thereby to exempt the company from liability for a total loss or destruction of the goods by fire while in the warehouse of the company or at an intermediate station on the line of transportation; and, therefore, this agreement (admitting that it was knowingly entered into by the plaintiff and founded upon a sufficient consideration) does not relieve the company of liability for the loss of the goods by fire, even though the fire were accidental and without fault on the part of the company, its agents or servants."

Fire was not a peril *ejusdem generis* with those particularly mentioned, and although the clause re-

lied on by the company was of the broadest kind, viz.:

> "from *any other cause* not the result of collision of trains, or of cars being thrown from the track while in transit,"

it was a general exemption following particular ones, and so could not operate to exempt the defendant from loss by fire.

In the case at bar as in the *Menzell case* the goods were in defendant's freight depot, and the case cited is directly applicable to the case at bar. The use of the words "nor in any other respect than as warehousemen" in the bill of lading in question, does not plainly or satisfactorily indicate that the parties thereby intended to exempt the company from loss by fire.

The change from carrier to warehousemen does not enlarge the scope or number of the excepted perils; it only changes the degree of care which the person in possession must exercise to escape liability from the perils mentioned.

Zimmer vs. *The New York, &c., R. Co.*, 42 N. Y. St. Rep., 63, was an action brought to recover the value of a horse which defendant was transporting under a contract, one of the conditions of which was that "neither this company, nor any of its connections, shall be liable for any injuries which the animals, or either or any of them, may receive in consequence of any of them being wild, vicious, unruly, weak, or of escaping, maiming themselves or each other, or in consequence of heat suffocation, or other ill effects of being crowded either upon cars or in yards, or on account of being injured by the burning of hay, straw or any other material for feeding the stock, *or in any way*," and the Court said:

> "The horse was struck by an improperly managed engine. Nothing of that kind is provided against in the contract, unless the words '*in any way*' so provide. These are

broad and general words, and they may operate without including this case. In the connection in which they are used they may be construed to mean 'or burning in any way,' the whole clause being 'or on account of being injured by the burning of hay, straw, or any other material for feeding the stock, or in any way.' *If they were intended to mean injured 'in any way' the intention is not clearly expressed*, and therefore may be rejected."

It must be borne in mind that in the case at bar the land carrier is expressly entitled to the benefit of all the particular exemptions contained in the bill of lading "*until delivery* at the port of New Orleans"; the benefit of these particular exemptions does not end when the cotton, before delivery, is "awaiting further conveyance." According to defendant's contention, however, when the cotton is "awaiting further conveyance," but is not delivered, it is not liable for loss from certain particularly enumerated perils, and is not liable except as warehousemen for any loss, no matter how caused, a somewhat anomalous construction.

If it had been the purpose of clause 11 to relieve the carrier from liability except as warehouseman from any and all causes of loss or damage while the cotton was "waiting further conveyance," certain particular exemptions would not have been expressly enumerated and made to continue in force after the cotton was "awaiting further conveyance," since that period would be covered by the general clause. If that had been the purpose, the particular exemptions would have ceased by their terms when the property was "awaiting further conveyance" and the general clause, by its terms, became operative.

If the effect of this eleventh clause be to exempt the carrier from liability except as a warehouseman for loss or damage from *any* cause "while the said

property awaits further conveyance," it takes, during that time, the place of every other clause in the bill of lading, which other clauses are expressly stated to be operative not only "while said property awaits further conveyance," but even further and "*until delivery* at the port of New Orleans."

Concededly the defendant was not exempted from loss by fire as a carrier, nor did it relieve itself from the loss by fire while the cotton was "waiting further conveyance." Its liability was that of a warehouseman only in respect of loss or damage caused by perils *ejusdem generis* with those particularly enumerated, that is to say, *the general words did not enlarge the specific exemptions and did not include any further exemptions,* except those of the same general character as such specific exemptions.

As carrier, this defendant, "*until delivery* at the port of New Orleans," was not liable for loss or damage from causes particularly enumerated. As warehouseman, while the cotton was "awaiting further conveyance" this defendant was not liable, in the absence of negligence, for loss or damage caused by any perils which were *ejusdem generis* with those particularly enumerated, but there the exemption ended; it did not include or cover any further cause of loss.

To hold otherwise is to import a new term into this bill of lading and to construe it, not strictly against the railroad, the party who prepared it, but strictly against the shipper, who was required to receive it.

A further authority on this point is The *G. R. Booth*, 62 U. S. App., 407, wherein the Court said, at page 410:

> "The bill of lading reads as follows: 'The ship and carrier shall not be liable for loss or damages occasioned by the perils of the sea or other waters, by fire from any cause or wheresoever occurring, by barratry of the master or crew, by enemies, pirates, robbers or thieves, by arrest and restraint of princes,

rulers or people, by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, by collision, stranding or other accidents of navigation, of whatsoever kind, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowner; nor for any loss or damage caused by heat, decay, putrefaction, vermin, rust, sweat, change of character, shrinkage, leakage, breakage; nor for any loss or damage arising from the nature of the goods or the insufficiency of the packages; nor for any country damages; nor for the obliteration, errors, insufficiency or absence of marks or numbers, address or description; nor for risk of craft, hulk or transshipment; nor for any loss or damage caused by the prolongation of the voyage; *nor for any loss or damage occasioned by causes beyond his control.*' It is upon the last clause that the appellee relies, and the contention is that the explosion having been without negligence on the part of the carrier, the damages in question are a 'loss or damage occasioned by causes beyond his control.'

Manifestly the clause was not intended to relieve the carrier for any loss or damage whatever occasioned by causes beyond his control, and without negligence; otherwise it would take the place of nearly every other cause of loss and damage specifically mentioned in the preceding clauses of the contract. Loss or damage occasioned by the perils of the sea would be occasioned by causes beyond the control of the carrier; so would losses arising by accidents of navigation of whatsoever kind; so would losses or damage arising from the nature of the goods; so would losses arising from insufficiency of address or description, and so would losses caused by the (unavoidable) prolongation of the voyage. *If it had been the purpose of the clause to relieve the carrier from liability occasioned by any of these causes they would not have been made the subject of particular enumeration. Some effect must be given it, but the instrument, having been prepared by the carrier, is not to*

> *be extended in his favor beyond the strictest meaning of its terms. This can be done by reading it as intended to apply to causes of loss* EJUSDEM GENERIS *with those particularized; and we think it exempts the carrier* ONLY *from other causes of loss or damage of a like nature to those enumerated and beyond his control.*"

The very language of this opinion, as well as the principle therein laid down, applies to this case.

It being well settled law that carriers cannot claim through the use of general expressions exemption from losses not of the same general nature as those specifically enumerated, we submit that the carrier by land did not in this bill of lading secure exemption from loss by *fire*.

This construction is reasonable and consistent, and should therefore be adopted by the Court. As was said by Judge Wallace, in construing a carrier's receipt, in *Ayres v. The Western Railroad Corporation*, 14 *Blatchford*, 9:

> "This construction is consistent with the instrument as a whole, with the relations of the various parties to it, and with the nature of the transaction the receipt is intended to provide for. *If the meaning of the conditions were doubtful, the construction to be given them should be the one most strongly against the carrier.* The conditions are designed to relax the common law liability of the carrier—a liability which the shipper has a right to insist upon, and of which he is not to be deprived without clear evidence of his assent. *If the meaning of such conditions is involved in any doubt, the doubt is to be resolved in his favor.*"

And this bill of lading, which was prepared by the carrier, presents, as stated by Judge Shiras in the case of *Wilson* v. *Cooper*,

> "*a case for the application of the general rule that where one party prepares the contract*

and the other accepts it, as thus prepared, if there is doubt as to the construction of any of the clauses therein contained the interpretation MUST *be against the party who prepared the contract.*"

95 *Fed. Rep.*, 625, *at p.* 628.

Third Point.

The verdict for the shippers was rightfully directed and the judgment should be affirmed.

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